Haddon Craftsmen, Inc. *and* Graphic Arts International Union, Local Union No. 97B. Case 4–CA–15161–1

November 30, 1990

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS CRACRAFT AND DEVANEY

On June 17, 1988, Administrative Law Judge William A. Pope II issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel and the Charging Party filed separate responses to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order.

The judge found that the Respondent engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) and Section 8(d) of the Act by reclassifying its bookbinder B and C employees as bookbinder D employees without affording the Union the opportunity to bargain over the decision and in repudiation of the terms of its collective-bargaining agreement with the Union. The Respondent has excepted, contending, inter alia, that the Union waived its right to bargain over the changes and that the parties' agreement did not apply to these reclassifications. For the reasons set forth below, we find merit in the Respondent's exceptions and we dismiss the complaint.

The facts, as found by the judge, are as follows. The Respondent operates a bookbindery. Traditionally, the Respondent's unit employees have been classified in the following four categories, in decreasing order of job skills: bookbinders A, B, C, and D. The Respondent and the Union have had collective-bargaining agreements since 1974, the most recent of which was effective from April 4, 1983, through April 6, 1986.[2] Over the past several years, advances in technology have led to the emergence of cheaper and simpler bookbinding techniques and machinery. The Respondent's orders have changed accordingly, with a resulting decrease in the amount of semiskilled work in classifications B and C. On three previous occasions since 1974, the Respondent has reduced some B or C employees to the D classification. In each instance the Respondent notified the employees and the Union in advance of the change. In early 1985, the Respondent determined, in view of the decreasing amount of semiskilled work, that its interests would be served by reclassifying its remaining B and C employees as D employees. In mid-April, the Respondent's then acting plant manager, Ephault, notified Union President Hennigan that the Respondent was planning to reclassify all bookbinder B and C employees as D employees. Ephault testified that Hennigan did not state any objections to the reclassification, but expressed concern over the need of some senior employees for retraining. Hennigan admitted that, when informed of the contemplated change, he did not request bargaining, stating that he viewed the Respondent's decision as already made, a fait accompli that rendered such a request futile. Hennigan met again with plant management on April 17 and 23 and May 28 concerning the effects of the reclassification, but, by his own admission, did not request bargaining on the issue of the reclassification itself at any of these meetings. The parties did bargain over seniority related issues. On April 22, the Respondent posted a notice to employees announcing the reclassification, to become effective on June 3.[3]

On June 6, Hennigan filed a grievance over the reclassification. The grievance, based, inter alia, on the Union's contention that ''unilaterally'' demoting employees out of contractually established job classifications violated their contractual rights, was denied by the arbitrator on November 3. In denying the grievance, the arbitrator noted that the issue of the Respondent's compliance with article III, section 7(a) of the contract had not been raised. This provision stated in part:

> [w]hen an employee has been permanently assigned to a job rated lower than that which he has been performing, his wages shall be adjusted to conform to the rate assigned to the job in question. It shall be the responsibility of the Foreman and Steward to determine when such an assignment is to be permanent.

Although stating that the question of whether the steward and foreman had participated in determining of the changes were permanent was not before him,[4] the arbitrator concluded that the assignments at issue were in fact permanent. After the grievance was denied, processing of the charge in this case, which had been de-

[1] In adopting the judge's finding that the Respondent's reclassification of employees was a mandatory subject of bargaining, we do not rely on his consideration of whether the Respondent's business was failing.

[2] Unless otherwise noted, all subsequent dates will be in 1986.

[3] According to the notice to employees posted by the Respondent on April 22, after the reclassification the Respondent would continue to pay the ''higher 'B' and 'C' rates . . . when that type of work is performed. If an employee performs 'B' or 'C' type work for three full days, they [sic] will be paid for the entire week at the higher rate.''

[4] Union President Hennigan testified that he was the only witness at the arbitration and that he did not discuss that provision.

ferred under *Collyer Insulated Wire*, 192 NLRB 837 (1971), was resumed.[5]

1. The judge found that the Respondent had presented Hennigan with a fait accompli and thus, although Hennigan admitted that he never sought to bargain over the reclassification, the Union did not waive its right to bargain over the assignments. We disagree with the judge.

In view of Hennigan's failure to deny that plant management informed him in mid-April that the reclassification was planned and, indeed, his concession that they ''may have'' informed him, we find that the Union received notice between 5 and 11 days before the Respondent notified the employees of the change on April 22, and more than 5 weeks before the reclassification went into effect on June 3. It is settled Board law that ''[W]hen an employer notifies a union of proposed changes in terms and conditions of employment, it is incumbent upon the union to act with due diligence in requesting bargaining.'' *Jim Walter Resources*, 289 NLRB 1441 (1988), quoting *Clarkwood Corp.*, 233 NLRB 1172 (1977). We find that the notice provided by the Respondent in this case was sufficient to provide a meaningful opportunity to bargain had the Union sought to do so.

We also find, contrary to the judge, that the evidence is insufficient to find that the Respondent presented the Union with a fait accompli in announcing the contemplated change. The judge relied, inter alia, on the wording of the April 22 notice to establish that a request for bargaining by the Union would have been futile. We disagree with his findings for the following reasons. First, as a factual matter, the written notice did not constitute the initial notice to the Union of the projected change, for, as noted above, the Respondent notified Hennigan orally in mid-April of the change. The starting point for our analysis, then, is the initial notification. The only conceivable evidence of a fait accompli contemporaneous with the Respondent's initial oral notice to the Union is Hennigan's subjective impression that the Respondent had made up its mind to reclassify the employees before it notified the Union. The record, however, yields no *objective* evidence that, at this point, the Respondent acted in a manner that relieved the Union of its obligation to request bargaining by, e.g., informing the Union that bargaining would be futile[6] or by implementing the changes before announcing them to the Union.[7] Hennigan's subjective impression of the Respondent's state of mind, taken alone, did not excuse the Union from testing the Respondent's good faith with a demand to bargain.[8]

Second, turning to the notice itself, we reject the judge's reasoning that its ''positive language'' demonstrated that the Respondent unlawfully presented the Union with a fait accompli. This element of the Respondent's course of action alone does not constitute an indication that a request for bargaining is futile. The Board has found that it is not unlawful for an employer to present a proposed change in terms and conditions of employment as a fully developed plan or to use positive language to describe it.[9] In short, when a union receives notice that a change in terms and conditions of employment is contemplated, it must fulfill its obligation to request bargaining over the change or risk

[5] We agree with the judge for the reasons set forth in his decision that deferral to the arbitration proceeding is inappropriate.

In our view, our colleague's concurring opinion pays little if any attention to the arbitrator's explicit concession that he had no evidence before him concerning whether the parties had operated in accord with art. III, sec. 7(a) of the contract. In finding that the Respondent had not violated the contract, then, the arbitrator could only assume that this provision had not been violated, and his ruling that the Respondent had not breached the contract was based in part on an assumption concededly unwarranted by the facts before him.

We note further that the record discloses no evidence that the arbitrator considered whether the Respondent had afforded the Union adequate notice of the change or the opportunity to bargain over it. This fact is significant because the amended complaint alleges that the Respondent violated Sec. 8(a)(5) and (1) and Sec. 8(d) of the Act by failing to continue ''in full force and effect all the terms and conditions of the contract'' *and* by reclassifying employees without affording the Union notice or an opportunity to bargain over the change. Thus, the complaint alleges a violation under two distinct theories. Our colleague also ignores the arbitrator's failure to consider this second issue of whether the Respondent failed in its obligation to provide notice and an opportunity to bargain over a proposed change in terms and conditions of employment. In this regard, we view *Armour & Co.*, 280 NLRB 824 fn. 2 (1986), as dispositive of the propriety of deferral in this case. In *Armour*, as here, an arbitrator found that the parties' contract did not specifically bar the respondent's unilateral change but did not consider whether the union had waived its statutory right to bargain or whether the respondent had met its statutory obligation to bargain over the change. In declining to defer, the Board noted that the absence of a ''contractual prohibition'' of the respondent's act was ''neither conclusive of the statutory issue . . . nor inconsistent with a finding that the Respondent had breached its statutory duty to bargain.'' Id. We find *Dennison National Co.*, 296 NLRB 169 fn. 6 (1989), cited by our colleague, distinguishable. In *Dennison*, the Board noted explicitly that deferral was appropriate because the arbitrator had found that the management-rights clause in the parties' agreement expressly permitted the unilateral changes at issue there. Moreover, the Board in *Dennison* distinguished the facts in that case from those in *Armour*, where, as here, the parties' agreement did not reserve such a right to the employer. In contrast with *Dennison*, the arbitrator's denial of the grievance here was admittedly predicated not on the contract's language, but on his assumption that the agreement's provisions had been followed. In this regard, we interpret the arbitrator's decision, taken as a whole, differently than does our colleague. We find no statement, read in context, that indicates that the arbitrator found an express contractual reservation of the right to reclassify employees unilaterally.

[6] Compare *Owens-Corning Fiberglas Corp.*, 282 NLRB 609 fn. 1 (1987).

[7] Compare *Ciba-Geigy Pharmaceuticals Division*, 264 NLRB 1013, 1017–1018 (1982), enfd. 722 F.2d 1120 (3d Cir. 1983).

[8] In finding that the Respondent presented the Union with a fait accompli, the judge also relied on Plant Manager Vispi's testimony that he had decided on the change before the Union was notified and that he believed that the Respondent could make such changes without consultation with the Union. These statements, however, do not indicate that Vispi, through his words or conduct, communicated to Hennigan any futility of a request to bargain. Moreover, Board law requires an employer, after reaching a decision concerning a mandatory subject, to delay implementation of the decision until after it has consulted with the bargaining representative, but does not require that the employer delay the decision-making process itself. *Lange Co.*, 222 NLRB 558, 563 (1976).

[9] *Owens-Corning Fiberglas Corp.*, supra, 282 NLRB at 609 fn. 1; *Michigan Ladder Co.*, 286 NLRB 21 fn. 4 (1987). See also *Medicenter, Mid-South Hospital*, 221 NLRB 670, 678–679 (1975); *Southern California Stationers*, 162 NLRB 1517, 1543 (1967) (employer did not breach its duty to bargain when its spokesman presented change in conditions of employment as a decision already made; decision was still executory and no steps had been taken to implement it).

a finding that it has lost its right to bargain through inaction and, as a consequence, risk the dismissal of 8(a)(5) allegations because no objective basis exists to find or infer bad faith on the part of the employer. In this case, the Union waived its right by permitting days to pass before the notice was posted and weeks to pass before the change was effected without requesting bargaining.

2. The judge further found that the Respondent had repudiated its contractual obligations to the Union under two separate theories. First, he found that article III, section 7(a) of the agreement, quoted above, required the Respondent to negotiate with the Union's steward as to when the reassignment of B and C employees to the D classification became permanent, and that accordingly, in unilaterally determining the effective date of the permanent reassignment, the Respondent violated Section 8(a)(5) and (1) of the Act. Second, the judge rejected the Respondent's argument that articles X, XI, and XII of the agreement empowered it to reclassify employees unilaterally, finding, instead, that articles X and XI taken together establish procedures to be followed if large numbers of employees are reassigned.[10] We agree with the Respondent, however, that the language of article III, section 7(a) essentially applies to the reassignment of individual employees to new tasks. In this regard, it appears to us unlikely that a contract would entrust the foreman and steward with deciding the effective date of the reassignment of a large bloc, or possibly the majority, of the Respondent's unit employees. We further note that, even assuming arguendo that article III, section 7(a) applies to a such reclassification, the section requires the parties to bargain over the timing of the permanency of the change. In this regard, we note that there is no evidence that Hennigan requested that the Respondent's foreman consult with the Union over the date the reclassification would become permanent or asserted to the Respondent that this provision governed the reclassification.

With regard to the judge's second theory for the violation, we find that the General Counsel has not demonstrated that the Respondent violated Section 8(a)(5) by repudiating its obligations under articles X and XI. As an initial matter, we note that neither the General Counsel nor the Union argued to the judge that articles X and XI were applicable to the reclassification of the employees.[11] Although we find unpersuasive the Respondent's argument that these articles permitted it to make such changes unilaterally, we are not persuaded by the judge's interpretation of the parties' contract to the effect that the reclassification activated these provisions and that the Respondent repudiated its obligations under them. In this regard, we note that even if articles X and XI do apply to the reassignment at issue here, they require that the parties bargain over the deployment of personnel, and if they are unable to agree, that they institute certain procedures. Although the Union is privileged under Section 8(d) to insist that the Respondent adhere to the terms of the contract, the terms of articles X and XI, like article III, section 7(a), do not preclude the Respondent from reclassifying the employees—at most they require that the parties bargain over such changes. Thus, under the circumstances of this case, in which there is no evidence that the Union ever sought to bargain pursuant to article X or XI, and in view of our finding that the Union failed to test the Respondent's good faith by making a request for bargaining over the decision to reclassify employees, we find that the evidence does not support a finding that the Respondent repudiated articles X and XI of the parties' agreement by implementing the reclassification on June 3.

In light of the foregoing, we shall dismiss the complaint.

ORDER

The complaint is dismissed.

MEMBER CRACRAFT, concurring.

My colleagues find that the Union waived its right to bargain about proposed changes in terms and conditions of employment and that the Respondent did not repudiate any terms of collective-bargaining agreement. They therefore dismiss the complaint. I concur in dismissing the complaint because I believe the Board should defer to an arbitrator's decision finding that the contract authorized the Respondent to take the action it did. The disagreement between my colleagues and me centers on whether the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice issue.

In 1985 the Respondent notified the Union that it intended to reclassify two categories of employees to a single lower paying classification. The Union filed a grievance alleging a unilateral change without bargaining and a breach of the parties' contractual seniority provision. Before the arbitrator, the Union argued that the Respondent had, by the unilateral reassignments, violated the collective-bargaining agreement and the National Labor Relations Act.

The arbitrator found no merit to the grievance. The arbitrator observed that a contractual provision, article III, section 7(a), required a foreman and steward to determine when a reassignment was permanent and that

[10] In summary, art. X states that employee complements will remain the same unless equipment, methods, or workflow are modified, in which cases art. XI will apply. Under art. XI the parties are to try to negotiate appropriate employee complements before new equipment is to be installed and, if no agreement is reached, the proposals of each party are to be followed for a test period. If agreement still eludes the parties, the Respondent's proposals will be implemented and the Union may file a grievance. These provisions are set forth in the judge's decision.

[11] The Respondent argued that these provisions *excused* it from bargaining over the reclassification with the Union.

when an assignment to a lower classification was permanent, the employee's ''wages shall be adjust[ed] to conform to the rate assigned to the job in question.'' The arbitrator stated that although there was no evidence that a foreman and steward had made a determination, it was reasonable to conclude, based on the evidence presented to him, that the changes were permanent. The arbitrator therefore found no contractual provision that prohibited the Respondent's changes.[1] To the contrary, the arbitrator found that the reassignments ''are shown to have been authorized *and* intended, moreover, under [the collective-bargaining] agreement provisions.'' The arbitrator also found no violation of any seniority or other employee rights.

The administrative law judge found that the arbitration proceeding was fair and regular, the award was not repugnant to the Act, and the contractual issue presented was factually parallel to the unfair labor practice issue. Nevertheless, the judge declined to defer because he found that the arbitrator was not presented with the facts relevant to the unfair labor practice, i.e., whether the Respondent had complied with a contract provision not at issue in the arbitration proceeding. According to the judge, because the complaint alleges a failure to comply with article III, section 7(a) and the arbitrator had been presented with no evidence as to whether there had been compliance with article III, section 7(a), deferral was inappropriate. My colleagues adopt this part of the judge's decision without modification.

It is well settled that the Board will defer to an arbitration award when the proceedings appear to have been fair and regular, all parties had agreed to be bound, the decision of the arbitration is not clearly repugnant to the purposes and policies of the Act, *Spielberg Mfg. Co.*, 112 NLRB 1080, 1082 (1955), and the arbitrator considered the unfair labor practice to issue that the Board is called on to decide. *Raytheon Co.*, 140 NLRB 883, 884–885 (1963), enfd. in relevant part 326 F.2d 471 (1st Cir. 1964). The Board will find that the arbitrator has adequately considered the unfair labor practice if (1) the contractual issue is factually parallel to the unfair labor practice issue, and (2) the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice. *Olin Corp.*, 268 NLRB 573, 574 (1984); see also *Dennison National Co.*, 296 NLRB 169 (1989). In determining whether the standards for deferral have been met, the party seeking to have the Board ignore the arbitrator's award has the burden of affirmatively showing the defects in the arbitration proceeding or award. *Olin*, supra.

[1] If the reassignments were temporary rather than permanent, the contract required the Respondent to pay the reassigned employees at the higher wage rate during the temporary reassignments.

No one seriously disputes the judge's findings that the arbitration proceeding was fair and regular, all parties had agreed to be bound, and the award is not clearly repugnant to the Act. Thus, the remaining question is whether the arbitrator considered the unfair labor practice that the Board is called on to decide. I believe the answer to that question is affirmative.

The judge found that the contractual issue was factually parallel to the unfair labor practice issue. The General Counsel's brief concedes the contractual issues—whether the parties' agreement privileged the Respondent's unilateral reclassifications—was factually parallel to the statutory issue—whether the Respondent had an obligation to bargain over the reassignments.

Regarding whether the parties generally presented the arbitrator with facts relevant to the statutory issue, the record shows that the arbitrator received ample evidence. The arbitrator found that the reassignments were authorized and intended and that no contractual rights had been violated when the employees were reclassified to lower paying jobs. The arbitrator's finding was based on his determination that ''[o]n the precise facts in evidence . . . it, reasonably, must be concluded that the reassignments in issue were of a 'permanent' nature'' within the meaning of article II, section 7(a). That certain evidence[2] known to both parties at the time of the arbitration hearing, was not presented to the arbitrator does not defeat a finding that the arbitrator was generally presented with the facts relevant to the statutory issue. It is contrary to the Board's deferral policy ''to disregard [an arbitration] award merely because certain evidence was presented and contentions advanced in the unfair labor practice proceeding which were not presented in arbitration.'' *Electrical Workers IBEW Local 1522 (Western Electric)*, 180 NLRB 131, 132 (1969).[3] I would find that

[2] Such as the facts concerning compliance with art. III, sec. 7(a) of the contract and the timing of the charge.

Further, my colleagues' reliance on *Armour & Co.*, 280 NLRB 824 (1986), is misplaced. Rather than controlling the instant case, it is distinguishable for the reasons the Board set forth in *Dennison National Co.*, supra, 296 NLRB 169 fn. 6.

[3] In *Western Electric* an arbitrator held that an employee's letter to the union did not constitute a resignation and, therefore, the union could, pursuant to the contract's maintenance-of-membership clause, insist on the employee's discharge. The administrative law judge held that deferring to the arbitration award was inappropriate because evidence was not introduced in the arbitration proceeding concerning the employee's conversation with a union steward on which the employee may have relied in submitting the letter. The Board, although recognizing that the evidence to which the judge referred was not presented to the arbitrator, held that the judge should have deferred to the award. In the post-*Olin* case of *Certified Industries*, 272 NLRB 1138 fn. 1 (1984), *Western Electric* was cited with approval and in support of the following proposition: ''Not every possible contention need be presented to an arbitrator for deferral to be appropriate.''

The judge in the instant case rests his conclusion that the arbitrator was not presented with the facts relevant to the unfair labor practice on his finding that the parties presented no evidence in the arbitration proceeding on whether they had followed art. II., sec 7(a). Neither the judge nor my colleagues, moreover, claim that the arbitrator had no evidence before him that would support a finding that the reassignments were permanent. ''It is not necessary that the case have been presented the way the General Counsel might have presented it with

the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice.

Accordingly, I would find that the General Counsel failed to show any defects in the arbitration proceeding or award that warrant failure to defer. Because I would defer to the arbitrator's award, I therefore concur with my colleagues in dismissing the complaint.

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the benefit of hindsight. The Board's involvement is not in the nature of an appeal by trial de novo.'' *Badger Meter*, 272 NLRB 824, 826 (1984).

Judith I. Katz, Esq., for the General Counsel.
Sheldon Rosenberg, Esq., of Scranton, Pennsylvania, for the Respondent.
Robert D. Mariani, Esq., of Scranton, Pennsylvania, for the Charging Party.

DECISION

WILLIAM A. POPE II, Administrative Law Judge. In a complaint, dated May 28, 1986, as amended on August 14, 1986, the Regional Director for Region 4 of the National Labor Relations Board, alleged that since on or about June 3, 1985, Haddon Craftsmen, Inc. (the Respondent) has failed to continue in full force and effect all the terms and conditions of a collective-bargaining agreement, and that on or about June 3, 1985, the Respondent changed the job classifications of certain of its employees, without having afforded Graphic Arts International Union, Local Union No. 97B (the Union) an opportunity to negotiate and bargain as the exclusive representative of Respondent's employees, in violation of Sections 8(a)(1) and (5) and 8(d) of the National Labor Relations Act (the Act). The charge was filed by the Union on July 1, 1985. The trial took place on August 25 and 26, and September 30, 1986, in Scranton and Wilkes-Barre, Pennsylvania, respectively, before Administrative Law Judge William A. Pope II.

I. BACKGROUND

The Respondent manufactures books for publishers. It is not a book publisher, itself. It operates a computer composition plant in Allentown, Pennsylvania, where raw manuscripts are received. Printing is performed at Respondent's Bloomburg, Pennsylvania plant, and bookbinding is performed at its Scranton, Pennsylvania plant. At its Bloomburg plant, Respondent has five miniweb presses[1] and two sheetfed presses. The web presses turn out 32 page-folded signatures, or sections of a book. The sheetfed presses turn out 64 page slit-in-half press sheets which have to be folded.[2] At the Scranton plant, the pages or signatures are collated and bound, using the Smyth sewn, adhesive, or birth bound methods of binding books. The Smyth sewn method of binding books involves the use of a sewing machine which binds signatures together and flattens the backbone of the book. A more recent development in the binding books is by the use of adhesives. All pages are either cut at the backbone so that they become single pages and are bound with adhesive, or, in the birth bound method, the signatures are swathed on the bind and the adhesive is forced up into the swath to hold the paper together. The first adhesive binding machine was installed on June 25, 1975. According to Respondent's Exhibit 5, in 1976, 12,888,200 books were bound by the Smyth sewn method, and 7,847,800 were bound with adhesive. In 1985, only 1,673,600 books were bound by the Smyth sewn method, while 31,477,200 books were bound with adhesive.

Traditionally, the Respondent employs four categories of employees in its bookbinding operation: bookbinder A, bookbinder B, bookbinder C, and bookbinder D. Bookbinder A workers are the most skilled category of workers. Their duties are to set up, changeover, and operate certain bookbinding machinery which requires completion of a union apprenticeship program. bookbinder B workers perform jobs which do not require completion of an apprenticeship program, and entail physical effort on a continuous basis, such as operating and loading folding machine and board cutters. Bookbinder C workers perform jobs which do require set up, change over, and operation of machinery, but do not require completion of an apprenticeship program. Typically they are sewers (who operate the Symth sewing machine), tipping machine operators, and brackett strippers. Bookbinder D workers are auxiliary workers who perform tasks not performed by A, B, or C workers, and act as helpers for A, B, and C workers. Bookbinder A workers are considered to be journeymen; bookbinder B and C workers are semiskilled workers; and, bookbinder D workers are unskilled workers. The rate of pay per hour decreases from bookbinder A to bookbinder D.

The bindery department employees are represented by Graphic Arts International Union, Local Union No. 9B (the Union and Charging Party in this case). For purposes of this case the term of the latest collective-bargaining agreement between the Respondent and the Union covers from April 4, 1983, to April 6, 1986. The Respondent and the Union have had collective-bargaining agreements since April 4, 1974.

The change in the technology of bookbinding to adhesive binding has reduced the need for sewers. According to the testimony of Donald R. Vispi, the plant manager, before adhesive binding came into general use, the Respondent employed 72 bookbinder C Smyth sewing machine workers. By the time of the hearing in this case, he said, there were days when there was no work at all for Smyth sewing machine operators. The shift of printing work to web presses, which produce prefolded pages or signatures, similarly resulted in less work for bookbinder B folders.

It is undisputed that on June 30, 1975, the Respondent unilaterally permanently reduced 32 of its 48 bookbinder C employees to the bookbinder D classification. On June 23, 1980, the Respondent unilaterally permanently reduced 12 of its 48 bookbinder B employees to the bookbinder D classification. On August 3, 1981, the Respondent unilaterally permanently reduced 7 of its remaining 43 bookbinder B employees to the bookbinder D classification. And, on the same date, it unilaterally permanently reduced 11 of its remaining 35 bookbinder C employees to the bookbinder D classification.

The action by the Respondent which is the basis for the charge and complaint in this case took place on June 3, 1985, when the Respondent permanently reduced all remain-

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[1] Four of the web presses were installed between October 1976 and June 1980. The fifth web press was not installed until August 1986. (R. Exh. 4.)

[2] In 1977, 6,610,000 books were printed by web presses, and 20,694,000 books were printed by sheetfed presses. In 1985, 32,399,000 books were printed by web presses, while sheetfed press production had dropped to 1,796,000 books. (R. Exh. 4.)

ing bookbinder B and C employees to the bookbinder D classification. According to the Respondent's notice, dated April 22, 1985, ''The higher 'B' and 'C' rates will be paid only when that type of work is performed.'' On June 3, 1985, the Respondent posted a notice explaining the procedure under which bookbinder D employees who performed bookbinder B or C work would be paid at the higher rate for the B or C work which they performed.

II. ISSUES

The complaint alleges that the Respondent committed unfair labor practices, in violation of Sections 8(a)(1) and (5) and 8(d) of the Act by:

> (1) Failing since on or about June 3, 1985, to continue in full force and effect all the terms and conditions of Article III, Section 7(a) of the collective bargaining agreement by permanently reclassifying its Bookbinder B and C employees as lower paid Bookbinder D employees, at a time when the collective bargaining agreement could not be modified under Section 8(d) of the Act; and,
>
> (2) Changing on or about June 3, 1985, the job classifications of its Bookbinder B and C employees to Bookbinder D employees, and thereby reducing the wage rates of the employees.

The Respondent denies the allegations, and raises the issues of timeliness of the complaint and amended complaint, and deferral to arbitration as affirmative defenses.

A. *General Counsel's Theory of the Case*

General Counsel acknowledges that the Respondent unilaterally reclassified employees in 1975, 1980, and 1981, and that the Union did not request bargaining or file a grievance over the reclassifications. Respondent's 1985 reclassification was also accomplished unilaterally, the first formal notice to the Union being in the form of a memorandum announcing the June 3, 1985 reclassification, which the Respondent posted on April 22, 1985. General Counsel agrees that the Union did not at first state the Union's position concerning the reclassification, or request bargaining, because the union president believed the Respondent had already made up its mind. However, the Union and the Respondent did engage in bargaining over the effects of the reclassification on the bookbinder B and C employees. And, on June 6, 1985, the Union filed a grievance over the unilateral reclassification. The grievance was the subject of arbitration on October 22, and November 1, 1985, the arbitrator issued a decision denying the grievance, on the theory that the reassignments were authorized by the collective-bargaining agreement, and did not constitute a unilateral change.

On these facts, argues the General Counsel, deferral is inappropriate, because the arbitrator did not adequately consider the unfair labor practice issues that are the subject of the charge. The arbitration proceedings did not meet the test in *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955), because the arbitrator had not been presented with the facts relevant to resolving the unfair labor practices alleged.

Next, argues the General Counsel, changes in job classifications having the effect of cutting wages are mandatory subjects of bargaining under the Act. The Union, in this case, was presented with a fait accompli by the Respondent, which did not offer to bargain with the Union, and indicated that it had no intention of changing its decision. Where the Union is presented with a fait accompli, its failure to request bargaining does not constitute a contractual waiver or waiver in the face of past unilateral changes. In any event, prior waivers by a union of its bargaining rights do not constitute a waiver of future bargaining rights.

According to the General Counsel, the Respondent's failure to bargain and unilateral changes cannot be excused on the grounds that the trend from Smyth sewn books to adhesive bound books and the use of web presses were not changes in the nature of its business, which, under *Otis Elevator Co.*, 269 NLRB 891 (1984), are not mandatory subjects of bargaining. Unlike the situation in *Otis*, here the Respondent's June 3, 1985 reclassification turned on a reduction in labor costs, rather than a change in the scope, direction, or nature of Respondent's operation.[3]

In any event, states the General Counsel, the Respondent's unilateral reclassification of employees on June 3, 1985, violated article III, section 7(a), of the collective-bargaining agreement, and amounted to a unilateral modification of the agreement without the Union's consent.

B. *Charging Party's Theory of the Case*

The Charging Party generally follows the reasoning and arguments of the General Counsel. The Charging Party contends that the Regional Director properly refused to defer to the arbitrator's award and properly issued the complaint in this case, citing *Olin Corp.*, 268 NLRB 573 (1984), and *Spielberg Mfg. Co.*, supra. Further, the Respondent, which acted unilaterally, was obligated to bargain under Sections 8(a)(5) and 8(d) of the Act with regard to reduction of all B and C classified employees to the D classification, and when the Union was presented with a fait accompli, any request by the Union to bargain was futile. Finally, the Union did not waive its right to bargain because it did not oppose similar reductions in the past. According to the Charging Party, a waiver of the right to bargain collectively on one issue is not a waiver for all purposes for all times.

C. *Respondent's Theory of the Case*

The Respondent counters that it had no legal duty to bargain with the Union before making its decision to reclassify bookbinder B and C workers to bookbinder D positions. Its decision to reclassify its workers was the result of technological advancements, and Respondent's need to remain competitive in the book manufacturing business. Therefore, argues the Respondent, it had no duty to first discuss its decision to reclassify workers with the Union.

In any event, contends the Respondent, it would not have served any useful purpose to first bargain with the Union, since there was no way to restore the lost work to the bookbinder B and C employees. Distinguishing this case from *Fibreboard Corp. v. NLRB*, 379 U.S. 203 (1964), the changes here occurred gradually over 10 years, transforming the nature of the bookbinding process from a hand operated process to a machine operated process. The change amounted to a change in the scope and direction of the Respondent's

[3] General Counsel points out that the last piece of new bindery equipment used by bookbinder B employees was a Martini binder, installed in 1977.

enterprise, and did not turn on its desire to save labor costs. Thus, under *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981), the Respondent was not required to bargain. Similarly, under *Otis Elevator*, supra, the Respondent was not obligated to bargain when its decision to transfer work was premised on a desire to remain economically competitive and not merely on cost-saving ideas.

On the other hand, argues the Respondent, even if Respondent did have a legal duty to bargain with the Union before reclassifying its employees, the Union waived it right to engage in such bargaining by its inaction over 11 years and its failure to raise the issue during the negotiation of five collective-bargaining agreements. The procedure followed by the parties, according to the Respondent was that if the Union did not object to a change, its failure to object was taken as assent. Respondent stated that on six occasions, the Union did not request bargaining with regard to changes involving B and C workers, nor did it request bargaining concerning the change forming the basis of the current unfair labor charge, even though it had 2 months' warning that the change was going to be made. A fait accompli does not exist where the Union had 2 months' advance warning of the change, concludes the Respondent.

Moreover, says the Respondent, article X of the collective-bargaining agreement permitted it to reclassify the bookbinder B and C workers. Article X gives the Respondent the right to modify equipment, and methods or workflow. In this case, new machinery eliminated the functions of the B and C workers. Article III, section 7(a), is inapplicable to the situation in this case, because it only controls the assignment of one or two employees, not an entire classification of employees, which is controlled by articles X and XI.

But, the Respondent argues, even if article III, section 7(a), is applicable, Respondent fully complied with it. The union president and the acting steward, Thomas Hennigan, were aware of the reclassification, met with Respondent's officials to discuss it, but never objected to it, and did not request bargaining.

All else aside, says the Respondent, the complaint in this case should be dismissed because these charges have already been resolved by binding arbitration under the collective-bargaining agreement. For this proposition, Respondent relies on *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955), as modified by *Olin Corp.*, 268 NLRB 573 (1984). Here, it is clear that the contractual and statutory issues were factually parallel, and the arbitrator was presented with the facts generally relevant to resolving the unfair labor practice issue. The arbitrator interpreted the relevant portions of the collective-bargaining agreement with reference to the unfair labor practice charge, and concluded that the Respondent was not obligated to bargain over the elimination of jobs.

Finally, the Respondent contends that the complaint should be dismissed pursuant to Section 10(b) of the Act. The Union's first notification of the Respondent's intention to reclassify bookbinder C employees was on June 25, 1975; while its first notification that the Respondent intended to reclassify bookbinder B employees was on July 20, 1981. The Union, however, failed to grieve the reclassifications of either of these two occasions. In fact, the Union did not grieve reclassification until July 1, 1985, after yet another transfer had been announced and accomplished. The 6-month periods concerning the reclassification of bookbinder B and C employees began to run on July 20, 1981, and June 25, 1975, respectively, and had long expired by July 1, 1985.

III. FINDINGS AND CONCLUSIONS

The facts in this case are basically undisputed. In 1975, 1980, and 1981, the Respondent unilaterally reclassified bookbinder B or C employees to the lower paying classification of bookbinder D. The procedure followed by the Respondent was the same in each instance, it first informed the employees and the Union of the reclassification by written advance notice. The notice used terminology such as ''will be returned to the BB 'D' classification,'' or similar positively phrased terminology indicating that the Respondent had already reached its decision. The Union did not request bargaining concerning any of those reclassifications, nor did it file grievances.

In the instant case, the Union received formal notice of the permanent reclassification of all bookbinder B and C employees to bookbinder D, by written notice posted at the plant, copies of which were dated and delivered to the Union, on April 22, 1985, stating in pertinent part as follows:

> Due to changes in market demand, the requirement of bookbinder ''B'' and ''C'' skills has steadily declined, At this time, a number of employees are receiving the higher rate of pay as a ''B'' or ''C,'' but are not doing the skilled work. These employees are performing the same tasks as their regular rated auxiliary workers, but being paid more. Because market forecasts do indicate a continued downward trend, all employees will be returned to the BB ''D'' classification.
>
> The higher ''B'' and ''C'' rates will be paid only when that type of work is performed. If an employee performs ''B'' or ''C'' type work for three full days, they will be paid that entire week at the higher rate.
>
> BB ''B'' and BB ''C'' sign up sheets must be signed by you each day worked in that classification and countersignature by the department supervisor will be required.

The parties stipulated that on June 3, 1985, all bookbinder B and C employees were reclassified as bookbinder D employees.

Donald Vispi, the Respondent's plant manager, stated that the April 22, 1985 reclassification notice was posted at his direction, although it was actually signed by Gerald A. Ephault, who was then acting plant manager while Vispi was on special assignment running the Bloomburg plant. Vispi recalled meeting with Union President Hennigan on April 17, 1985, and discussing the Company's proposed reclassification with him. Vispi testified that Hennigan was concerned about retraining some of the workers who would be affected, but he did not request discussions concerning the reclassification, itself. Vispi said there were one or more meetings with Hennigan after the April 22, 1985 notice had been posted, but the discussions concerned the retraining of certain employees. At no time did Hennigan raise objections to the reclassification, or request bargaining over the reclassification.

According to Vispi, the Company was permitted by the collective-bargaining agreement to unilaterally reclassify employees. He stated that the procedure has always been that

if the Union disagreed with an action by the Company they filed a grievance, if they said nothing it was understood that they agreed, and the decision was implemented.

Gerald Ephault testified that he learned of the reclassification from Vispi in early April 1985, and that he told Hennigan what was going to happen during a meeting on April 11, 1985. According to Ephault, Hennigan did not object to the reclassification, but expressed concern about the retaining of senior bookbinder B and C people. There were further meetings with Hennigan on April 17 and 23, and May 28, 1985, concerning the reclassification, but the purpose of the meetings was to discuss retaining, and at none of these meetings did Hennigan object to the reclassification, itself. Hennigan's concern was seniority.

Thomas Hennigan, the union president, conceded that he could have met with company officials earlier in April 1985, and that the subject of the pending reclassification could have been mentioned. He stated that he did not respond to the talk of reclassification, did not state a union position concerning it, either consenting to it or opposing it, nor did he request bargaining or file a grievance at that time. He stated that he never asked the Company to bargain over the reclassification, because he felt that the Company's position was predetermined. He acknowledged that he discussed retraining and seniority with Vispi and Ephault. The May 28, 1985 meeting was actually for the purpose of discussing an extension of the collective-bargaining agreement, but the subject of seniority and retraining as it applied to the workers formerly in the bookbinder B and C positions was discussed. On June 6, 1985, Hennigan filed a grievance on behalf of the Union opposing the reclassification.

Article III, section 7(a), of the collective-bargaining agreement in effect between the Respondent and the Union, covering bindery department employees, during the period from April 4, 1983, to April 6, 1986, provides:

> (a) When an employee is assigned to a higher rated job he shall immediately be paid according to the rate for this job. When an employee has been permanently assigned to a job rated lower than that which he has been performing, his wages shall be adjusted to conform to the rate assigned to the job in question. It shall be the responsibility of the Foreman and the Steward to determine when such an assignment is considered permanent.

Article X of the collective-bargaining agreement provides:

> Existing complements will remain the same unless there is a modification to equipment, methods or work flow. If there is a modification to equipment, methods or work flow, then the change(s) would be considered as new equipment and the new equipment clause (Article XI) will apply.

Article XI of the collective-bargaining agreement provides, in pertinent part:

> Before new equipment is to be installed, the Union and Management will discuss the matter in an attempt to arrive at a complement of help. If an agreement cannot be reached prior to the installation of the equipment, a sixty (60) day trial period will commence during which time thirty (30) days will be allocated to trying the Union proposed complement, and thirty (30) days trying the complement proposed by the management.
>
> At the end of the trial period, if the Union and Management still cannot agree on the complement to be used, the equipment will continue to operate with the complement established by the Management, and the Union may grieve the complement subject to step 4 of the Grievance Procedure.

The Union's grievance was submitted to arbitration, and was denied by the arbitrator on November 1, 1985. The grievance considered by the arbitrator was, in part, that ''On June 3, 1985, the Company, while refusing to bargain at the request of the Union, changed the job classification system by unilaterally adopting a policy under which all employees in the contractually established bookbinder B and C classifications will be returned to the bookbinder 'D' classification effective June 3, 1985.'' The arbitrator found that the assignment of regular bookbinder ''B'' and ''C'' employees to bookbinder ''D'' when no B or C jobs were available or expected to become available did not violate any seniority or contractual rights of those employees, or constitute a unilateral change of the collective-bargaining agreement.

In his decision, the arbitrator, referring to the last sentence of article III, section 7(a), of the collective-bargaining agreement (''It shall be the responsibility of the Foreman and the Steward to determine when such an assignment is to be considered permanent.''), stated:

> While the evidence fails to show whether ''the Foreman and the Steward'' of these employees had made or participated in any determination that the specific reassignments in issue *had* been of a ''permanent'' nature, there is no claim or other evidence to the contrary, on either point, in this case. No such issue is raised herein.
>
> On the precise facts in evidence herein, it, reasonably, must be concluded that the reassignments in issue *were* of a ''permanent'' nature—within the meaning of the above-quoted Agreement provisions.

Thomas Hennigan's testimony in this matter is unrefuted that he was the only witness who testified in the arbitration hearing, and that he did not testify concerning article III, section 7(a), of the collective-bargaining agreement.

By letter of August 30, 1985, the Regional Director of Region 4 of the National Labor Relations Board notified the Respondent and the Charging Party of his determination that further proceedings should be administratively deferred for arbitration.

A. *The 10(b) Issue*

In a preliminary motion, Respondent argued that the complaint in this case should be dismissed under Section 10(b) of the Act, because the activities complained of had been going on openly and notoriously for a period of at least 11 years. I reserved my ruling on the motion until the evidence in the case was complete.

The Respondent posted a notice on April 22, 1985, stating that on June 3, 1985, all employees in the bookbinder B and

C classification would be reduced on June 3, 1985, to the lower paid bookbinder D classification. The reclassification did, in fact, take place on June 3, 1985. The charge in this case was filed on July 1, 1985. It was served on the Respondent on July 8, 1985. Therefore, on the face of it, there was compliance with Section 10(b), and there are no grounds for dismissing the complaint because of a violation of Section 10(b).[4]

The Respondent, however, argues that the 10(b) period began running on June 25, 1975, the date of the first reclassification of bookbinder C employees to bookbinder D, citing *Postal Service Marina Mail*, 271 NLRB 397 (1984). That case, however, does not support the proposition for which Respondent cites it. The holding of the case is simply that the period for filing an unfair labor practice charge begins to run on the date that a final adverse employment decision is made and communicated to the employees.

In this case, each reclassification of bookbinder B and C employees was a separate adverse employment decision, involving different employees at different times. As to the employees involved in each of the reclassification decisions, the 10(b) time began to run when the decision was communicated to them. The reclassification of all remaining B and C employees at issue in this case was effective on June 3, 1985, and was communicated to them by name on May 23, 1985. Whichever date is used, the 6-month 10(b) date had not run by the time the charge was filed on July 1, 1985, and served on the Respondent on July 8, 1985.

It is well established that a Union's failure to request bargaining in the past when an employer made unilateral changes does not operate as a waiver of the Union's right to request bargaining each time new bargainable issues arise. *NLRB v. Miller Brewing Co.*, 408 F.2d 12, 15 (9th Cir. 1969); *Ciba-Ceigy Pharmaceuticals Division*, 264 NLRB 1013, 1017 (1982), enfd. 722 F.2d 1120 (3d Cir. 1983); *Combustion Engineering*, 272 NLRB 215, 224–225 (1984). In *NLRB v. Miller Brewing*, supra at 15, the court stated:

> it is not true that a right once waived under the Act is lost forever . . . . Each time a bargainable incident occurs—each time new rules are issued—(the) Union has the election of requesting negotiations or not. An opportunity once rejected does not result in a permanent ''close-out.''

B. *Deferral Issue*

In another preliminary motion, the Respondent argued that the Board should defer to the arbitrator's decision that the Company had not acted unilaterally. I deferred ruling on the motion to allow the parties time to file points and authorities.

In *Olin Corp.*, 268 NLRB 573, 574 (1984), the Board reiterated the conditions under which it would defer to arbitration under a collective-bargaining agreement:

> In its seminal decision in *Spielberg*,[5] the Board held that it would defer to an arbitration award where the proceedings appear to have been fair and regular, all parties have agreed to be bound, and the decision of the arbitrator is not clearly repugnant to the purposes and policies of the Act. Accordingly, we adopt the following standard for deferral to arbitration awards. We would find that an arbitrator has adequately considered the unfair labor practice if (1) the contractual issue is factually parallel to the unfair labor practice issue, and (2) the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice. In this respect, differences, if any between the contractual and statutory standards of review should be weighed by the Board as part of its determination under the *Spielberg* standard of whether an award is ''clearly repugnant'' to the Act.

It would appear that the arbitration proceedings in this case were fair and regular, in accordance with the collective-bargaining agreement, and the decision of the arbitrator is not clearly repugnant to the purpose and policies of the Act. Further, the contractual issue presented to the arbitrator was factually parallel to the unfair labor practice issue, to which the arbitrator referred in his award. However, it is also quite clear from the arbitrator's award that he was not presented with the facts relevant to the unfair labor practice.

One of the unfair labor practices alleged in the complaint is that the Respondent failed to comply with article III, section 7(a), of the collective-bargaining agreement, in effect, thereby, unilaterally modifying the terms and conditions of employment embodied in that provision of the agreement. The arbitrator stated in his decision that the issue was not raised, because the evidence failed to show whether there had been compliance with the section of the collective-bargaining agreement in question. The provision of the collective-bargaining agreement at issue provides that it is the responsibility of the foreman and the steward to determine when the assignment of an employee to a lower rated job is permanent. As to this point, the arbitrator said there was no evidence whether the foreman and the steward had participated in such a determination (with regard to the reclassification of the bookbinder B and C employees to the lower paying bookbinder D classification). The arbitrator noted that there was no claim to the contrary, and concluded that the reassignment was permanent, and, thus, there was no issue.

Reinforcing the arbitrator's statements in his award, Union President Hennigan gave unrefuted testimony that he was the only witness who testified in the arbitration proceedings, and that he gave no testimony related to article III, section 7(a), of the collective-bargaining agreement.

Even assuming that the arbitrator was correct in his conclusion that the reassignment (or reclassification) was permanent, he had no evidence before on which to base a finding as to whether there had been compliance with section 7(a), and, if not, whether the failure by the Respondent to comply with section 7(a) constituted an unfair labor practice.

Accordingly, I find that deferral is inappropriate under *Olin Corp.*, supra, and *Spielberg Mfg.*, supra.

C. *Alleged 8(a)(1) and (5) Violations*

It is well established that an employer may not unilaterally change terms and conditions of employment which are the subject of mandatory bargaining, where its employees are represented by a collective-bargaining representative *NLRB v.*

[4] Sec. 10(b) of the Act prohibits the issuing of a complaint based on any unfair labor practice occurring more than 6 months prior to the filing of the charge with the Board and the service of a copy on the person against whom such charge is made, with certain exception not relevant to this case.

[5] *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955).

Katz, 369 U.S. 736 (1962). As stated by the Board in the recent case of *Alamo Cement Co.*, 281 NLRB 737 (1986):

> It is well settled that an employer violates Section 8(a)(5) and (1) of the Act by unilaterally changing terms and conditions of employment without first providing the collective-bargaining representative of its employees with a meaningful opportunity to bargain about the changes.

In this case, Graphic Arts International Union, Local Union No. 97B, was the properly certified collective-bargaining representative of Respondent's bindery employees at all relevant times.

Section 8(d) of the Act includes wages, hours, and other terms and conditions of employment as mandatory bargaining subjects. The obligation to bargain over midterm changes involving wages, hours, and other terms and conditions of employment, includes changes in job classifications which result in reduction of wage rates. *Westinghouse Electric Corp.*, 278 NLRB 424, 432 (1986).

The Respondent, however, argues that its decision to reclassify bookbinder B and C employees did not turn on a decision to save labor costs, but, instead, was motivated by the exigencies of a failing business. Therefore, under *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981), it had no duty to bargain over a decision ''involving a change in the scope and direction of the enterprise.'' To support this argument, Respondent points out that the web presses have virtually eliminated the need for manual folding, a task performed by bookbinder B employees, and adhesive binding has for the most part replaced the demand for Smyth sewn books, a task performed by bookbinder C employees. Among the other cases cited by Respondent to support its claim that an employer is not obligated to bargain with a union where a change represents a change in the nature and direction of the business, rather than a response to labor costs, are *Otis Elevator Co.*, 269 NLRB 891 (1984); *Columbia City Freight Lines*, 271 NLRB 5 (1984); and *Drummond Coal Co.*, 277 NLRB 177 (1986). In sum, Respondent argues that because of its decreased need for bookbinder B and C workers, the workers in those classifications had to be assigned bookbinder D work, otherwise they would be idle.

Otis Elevator Co., supra, dealt with the question of whether a decision by management to discontinue work performed at one facility and transfer it to another facility is a mandatory subject of bargaining. In *Otis* the Board held that it was not a decision subject to mandatory bargaining, because the decision turned on a change in the nature or direction of the employer's business, and not on labor costs. The Board said, ''[E]xcluded from Section 8(d) of the Act are decisions which affect the scope, direction, or nature of the business.'' 269 NLRB at 893.

The evidence in this case clearly establishes an evolutionary change in the methods of bookbinding, which, to a great extent, made the functions of bookbinder B and C employees obsolete (although not entirely so, as there is still some production of hand-folded, Smyth sewn books). But, there is no evidence at all in this case that the Respondent's business was failing, or that the nature and direction of its business had changed. Nor is there any evidence that the B and C workers were idle. Quite the contrary, the evidence shows that the B and C workers were busy, if not doing traditional B and C work, then doing bookbinder D work. The reclassification did not change the nature of the day-to-day duties of the former bookbinder B and C employees. If there was no B or C work available, they continued to do what they had done in the past, bookbinder D work. Nor did the reclassification result in any employees being laid off or terminated. The only effect that the reclassification had on Respondent's operation, in fact, was a lowering of its labor costs, because bookbinder D employees are paid less than bookbinder B and C workers.

It is abundantly clear from the notice of Arpil 22, 1985, and the testimony of Donald R. Vispi, Respondent's plant manager, that the purpose of the June 3, 1985 reclassification of bookbinder B and C employees to the bookbinder D classification, as well as the purpose of all preceding reclassifications dating back to 1975, was to equalize the pay of all employees doing bookbinder D work. The notice of April 22, 1985, states ''At this time, a number of employees are receiving the higher rate of pay as a ''B'' or ''C,'' but are not doing the skilled work. These employees are performing the same tasks as their regular rated auxiliary workers, but being paid more. Because market forecasts do indicate a continued downward trend, all employees will be returned to the BB ''D'' classification.'' Donald R. Vispi testified that the bookbinder B and C employees were being paid at a higher rate for doing a lesser type job, and ''we felt it was necessary to get people in the plant on an equal pay for equal work basis. According to Vispi, the bookbinder D employees complained that B and C workers were being paid more for doing the same work as performed by the bookbinder D employees.

I find, based on this record, that the Respondent's only motive for reclassifying its bookbinder B and C employees was to save labor costs. There were no compelling reasons, based on the economic conditions of the Respondent or a change in the nature or direction of its business, which caused it to reclassify its bookbinder B and C employees at that particular time. Respondent has shown absolutely no compelling necessity for its precipitous action, which in any way relieves it of its duty to bargain with the Union on an issue which is otherwise clearly a subject of mandatory bargaining.

In this case, the Union did not request bargaining when it first orally learned that all bookbinder B and C employees would be reclassified in the lower paying classification of bookbinder D, nor did it request bargaining when it was formally informed of the reclassification shortly afterward by the written notice of April 22, 1985, in which the effective date of the reclassification was stated to be June 3, 1985. There is no dispute that the Union at first only requested effects bargaining, and later, on June 6, 1985, filed a grievance over the Respondent's unilateral action.

The written notice of April 22, 1985, was phrased in positive language, which left no doubt that the Respondent had already made its decision to reclassify the bookbinder B and C workers. The notice states:

> Because market forecasts do indicate a continued downward trend, all employees (bookbinder B and C employees) will be returned to the BB ''D'' classification.

Any doubt as to the finality of the decision is disposed of by the testimony of Donald R. Vispi, Respondent's plant manager, who testified that he made the decision to reclassify the bookbinder B and C workers to the bookbinder D classification (after consulting with his superior), and that the action was unilateral. He stated that in his view the collective-bargaining agreement allowed the Respondent to unilaterally deal with employee complement and implement installation of equipment.

In *Intersystems Design Corp.*, 278 NLRB 759 (1986), the Board had occasion to discuss the principles governing timely notice of unilateral change of conditions of employment and effects bargaining. The Board cited *Ciba-Geigy Pharmaceuticals Division*, 264 NLRB 1013, 1017 (1982), in which it adopted the judge's language, as follows:

> The Board has long recognized that, where a union receives timely notice that the employer intends to change a condition of employment, it must promptly request that the employer bargain over the matter. To be timely, the notice must be given sufficiently in advance of the actual implementation of the change to allow a reasonable opportunity to bargain. However, if the notice is too short a time before implementation or because the employer has no intention of changing its mind, then the notice is nothing more than informing the union of a fait accompli.

Board also quoted the language of the court in *Gulf States Mfg. v. NLRB*, 704 F.2d 1390, 1397 (5th Cir. 1983):

> It is . . . well established that a union cannot be held to have waived bargaining over a change that is present as a fait accompli . . . ''An employer must at least inform the union of its proposed actions under circumstances which afford a reasonable opportunity for counter argument or proposals.'' . . . Notice of a fait accompli is simply not the sort of timely notice upon which the waiver defense is predicated.

In this case, the Respondent's notice of April 22, 1985, was nothing less than a notice of a fait accompli. The only reasonable interpretation of the notice is that the Respondent had made an unequivocal unilateral decision to reclassify its bookbinder B and C employees, and was putting the Union and employees on notice as to the effective date when the reclassification would be implemented. The notice did not leave any doubt as to the outcome of the decision, nor did it afford the Union any opportunity to present its views. Indeed, the Union's views were not solicited, and the tone of the notice was that the decision was not negotiable. Donald R. Vispi, Respondent's plant manager, candidly admitted that the Respondent's decision was final before the Union was notified, and that he believed the Respondent had the contractual right to deal unilaterally with employee complement issues.

Under the circumstances of this case, I find that the Union did not waive its right to request bargaining over the reclassification of bookbinder B and C employees to the lower paying Bookdinder D classification. The Respondent presented the change to the Union as a fait acompli, without any intention of changing its mind. The Respondent's unilateral action in this regard violated Section 8(a)(5) and (1) of the Act.

D. *Alleged Violations of the Collective-Bargaining Agreement*

The General Counsel argues that the reclassification of the bookbinder B and C employees violated article III, section 7(a), of the collective-bargaining agreement, and, thus, Section 8(a)(5) and (1) of the Act. Among other cases, the General Counsel relies on *Willis Electric*, 269 NLRB 1145 (1984), in which the Board said (at 1146):

> It is well established that an employer acts in derogation of its bargaining obligation under Section 8(d) of the Act when, during the life of a collective-bargaining agreement to which it is bound, it unilaterally repudiates terms and conditions of employment contained in the agreement. *Morelli Construction Co.*, 240 NLRB 1190 (1979). It is equally well established economic necessity is not cognizable as a defense to the unilateral repudiation of a collective-bargaining agreement. [Ibid].

Specifically, General Counsel argues that the Respondent failed to follow the procedural requirements of section 7(a) ''that the foreman and steward jointly determine whether the reassignment of the B and C bookbinders to D bookbinder is permanent.''

The Respondent, in contrast, argues that even if the reclassification of bookbinder B and C employees was unilateral and related to a mandatory bargaining subject, its action was authorized by articles X, XI, and XII of the collective-bargaining agreement. Article III, section 7(a), contends the Respondent, is inapplicable to the present situation. First, the Respondent contends that the shop steward, Wilfred Tucker, was absent from work because of injury during the relevant time, and it cannot be faulted for not obtaining his approval of the reclassification. In any event, section 7(a), says the Respondent, refers to the equivalent of promotion or demotion of individual workers, and does not encompass the movement of complements of workers whose jobs have been eliminated by technological advances.

Section 7(a) of article III of the collective-bargaining agreement refers to the obligation placed on the ''Foreman'' and the ''Steward'' when an employee has been permanently assigned to a lower paying job. In that event, ''It shall be the duty of the Foreman and the Steward to determine when such an assignment is permanent.''

Two things are apparent at once from reading section 7(a). First, it imposes no obligation on the employer to bargain with the Union over the question of whether an employee may be permanently assigned to a lower paying job. Insofar as this section of the collective-bargaining agreement is concerned, that decision is left up to the employer. All the employer is required to bargain over is when the assignment is considered permanent. Second, although the section uses ''employee'' in the singular, it does not limit the section to assignments involving any particular number of employees.

In this case, a total of 21 employees were simultaneously reclassified from bookbinder B and C to the lower paying classification of bookbinder D. There is no question but that the Respondent intended the reclassification to the lower rated job to be permanent, and that it unilaterally established the effective date as June 3, 1985. Apparently under Respondent's theory, only if it had downgraded the employees one at a time would the effective date of the reclassification

have been bargainable under section 7(a). I find that to be an unintended and unreasonable interpretation of section 7(a), which would permit the Respondent, at its option, to avoid its obligations under section 7(a) simply by simultaneously reclassifying to a lower rated job some number of employees greater than one or two.

Therefore, I find that the Respondent was required by article III, section 7(a), of the collective-bargaining agreement to negotiate with the Union's steward when the reclassification of bookbinder B and C workers would be permanent. That the parties left that determination to a foreman and steward was their choice when the collective-bargaining agreement was negotiated and signed. I find that it is clear from the evidence that the Respondent knew that Union President Hennigan was acting as steward in the absence of the regular steward, Wilfred Tucker. The Respondent was not relieved of its contractual obligation to bargain by the absence of Tucker. Considering all of the evidence, I find that the Respondent violated Section 8(a)(5) and (1) of the Act by its unilateral determination of the effective date of the reclassification of bookbinder B and C employees.

Equally erroneous is the Respondent's interpretation of articles X, XI, and XII of the collective-bargaining agreement, as giving it unilateral authority to reclassify entire complements of employees. Article XII of the agreement is a catch-all clause which reserves to the Company all ''rights, powers, function, privileges, and authority that it possessed prior to entering into this agreement except such as are relinquished or restricted by the terms of this agreement.'' Article X states, in substance, that complements will remain the same unless there is a modification to equipment, methods, or workflow; in which event, the changes will be considered as new equipment, and article XI applies. Article XI provides that when new equipment arrives, Union and management will discuss the matter in an attempt to arrive at a complement of help. If there is no agreement, there is to be a 60-day trial period during which each side's proposals concerning complements will be tried for 30 days. If at the end of that time, there is still no agreement, management will continue to operate the equipment with the complement it proposed, and the Union may grieve the complement.

Clearly, under article X and XI, the Respondent was obligated to discuss with the Union the changes it deemed necessary because of modification to equipment, methods, or workflow, before changing existing complements of employees. If no agreement could be reached, the Respondent was obligated to try the Union's proposal for 30 days before implementing its own proposal. Because article X and XI cover the procedures to be followed if the Respondent wants to make changes in complements of workers, article XII is superceded and has no applicability.

As the Respondent clearly failed to observe the requirements of articles X and XI, when read together, as required by article X, it unilaterally repudiated the terms and conditions of employment contained in a valid, existing collective-bargaining agreement, in derogation of its bargaining obligation under Section 8(d) of the Act, and in doing so, violated Section 8(a)(5) and (1) of the Act.[6]

[6] I reject the General Counsel's request for a visitatorial clause. The record does not show it likely the Respondent would seek to evade compliance with any order the Board should issue in this case. Such clauses are not routinely included in the Board's Orders. (See *Cherokee Marine Terminal*, 287 NLRB 1080 (1988).)

CONCLUSIONS OF LAW

1. Haddon Craftsmen, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Graphic Arts International Union, Local Union 97B, is a labor organization within the meaning of Section 2(5) of the act.

3. The Respondent's Bindery Department employees, identified in article 1, paragraph 3, of the collective-bargaining agreement between the Respondent and the Union, covering the period from April 4, 1983, to April 6, 1986, constitute an appropriate unit for collective bargaining within the meaning of Section 9(b) of the Act.

4. The Respondent's decision on April 22, 1985, to reclassify as of June 3, 1985, all of its bookbinder B and C employees to the lower paying classification of bookbinder C was a mandatory bargaining subject under Section 8(d) of the Act.

5. The Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally reclassifying all of its bookbinder B and C employees to the lower paying classification of bookbinder D on June 3, 1985, without affording the Union an opportunity to bargain over the change in the terms and conditions of the employees' employment.

6. The Respondent violated Section 8(a)(5) and (1) of the Act, on or about June 3, 1985, by repudiating the terms of the collective-bargaining agreement to which it was bound, by unilaterally reclassifying its bookbinder B and C employees to the lower paying classification of bookbinder D.

7. The unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent engaged in unfair labor practices, I find it appropriate to order Respondent to cease and desist therefrom and to take certain affirmative action to effectuate the policies of the Act.

The Respondent, having engaged in unfair labor practices in violation of Section 8(a)(5) and (1) of the Act, shall be ordered to cease and desist from engaging in these unfair labor practices.

The Respondent, having committed unfair labor practices by on or about June 3, 1985, unilaterally, and without affording the Union a meaningful opportunity to bargain, reclassifying its bookbinder B and C employees to the lower paying classification of bookbinder D, shall restore all employees who were thus reclassified to their former classifications of bookbinder B or C, without prejudice to their seniority or any rights or privileges, and shall make them whole for any loss of earnings which they may have sustained as a result of the Respondent unlawfully reclassifying them on June 3, 1985. Backpay shall be based on earnings which the reclassified employees would normally have received during the applicable period as bookbinder B or C employees, less any net interim earnings, and shall be computed on a quarterly basis in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest thereon computed in the manner

provided in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[7]

[Recommended Order omitted from publication.]

[7] In accordance with the Board's decision in *New Horizons for the Retarded*, supra, interest on and after January 1, 1987, shall be computed at the ''short-term Federal rate'' for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest on amounts accrued prior to January 1, 1987 (the effective date of the 1986 amendment to 26 U.S.C. § 6621), shall be computed in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977).